Filed 12/10/03 In re M.R. CA3

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

In re M.R., a Person Coming Under the Juvenile Court Law.	C043536 and C044137
BUTTE COUNTY CHILDREN'S SERVICES DIVISION, Plaintiff and Respondent, v. DEBORAH R., Defendant and Appellant.	(Super.Ct.No. J29104)

Deborah R. (appellant), the mother of M.R. (the minor), appeals in two cases from orders of the juvenile court denying her petition for modification and terminating her parental rights. (Welf. & Inst. Code, §§ 366.26, 388, 395; further unspecified section references are to the Welfare and Institutions Code.) Appellant contends that the juvenile court's orders must be reversed because of the failure of the court and Children's Services Division (CSD) to comply with the notice provisions of the Indian Child Welfare Act of 1978 (the

Act). (25 U.S.C. § 1901 et seq.) We disagree with that contention and affirm the orders.

FACTS AND PROCEDURAL HISTORY

The following quoted facts are taken from this court's previously filed unpublished opinion in *In re Mary R.* (July 32, 2003) C041361 of which we take judicial notice. (Evid. Code §§ 451, subd. (a) & 459.)

"On July 23, 2001, Children's Services Division (CSD) filed an original juvenile dependency petition pursuant to section 300 on behalf of the two-year-old minor. As amended, that petition alleged in part that the minor was at a substantial risk of suffering serious physical harm due to the unsafe condition of the minor's home and to appellant's history of substance abuse. The petition did not allege the minor might be a member of, or eligible for membership in, a federally recognized Indian tribe.

"The detention report noted the Act 'does or may apply.' According to that report, appellant had told the social worker she had "Indian heritage." However, appellant did not know the name of her tribe, nor did she know the whereabouts of her father, who she said would know the identity of the tribe.

"After the juvenile court assumed jurisdiction over the minor, CSD filed a disposition[al] report. That report also noted the Act 'does or may apply.' Appellant had confirmed she had Indian heritage through her father, and that he was "enrolled with the Choctaw and Cherokee tribes."

"The disposition[al] report stated CSD had notified six tribes of the proceedings and was awaiting confirmation of the minor's status. Those tribes were: United Keetoowah Band [of Cherokee Indians of Oklahoma], Mississippi Band of Choctaw Indians, Jena Band of Choctaw, Eastern Band of Cherokee Indians, Choctaw Nation of Oklahoma, and Cherokee Nation of Oklahoma.

"The record contains responses to the notices from all of the tribes except for United Keetoowah Band. Each tribe determined the minor was not a tribal member or was not eligible for tribal membership. [However, t]he record does not contain copies of any correspondence sent to the tribes by CSD."

On April 19, 2002, the juvenile court terminated appellant's reunification services. Thereafter, appellant filed a petition for modification of previous juvenile court orders. The juvenile court denied that petition. Appellant appeals from that order.

At a November 2002 hearing, the juvenile court ruled that the Act did not apply to the proceedings. However, the court also stated that if the parties obtained new information on the matter, it would reconsider its decision. Thereafter, at a February 2003 hearing, counsel for appellant reported to the court as follows: "In terms of Indian Child Welfare Act, I've been searching, and [appellant], [appellant's] grandmother, the lady by the name of Rose Pettigrew, her great-great grandmother, her brothers and sisters had to go on the Trail of Tears from Oklahoma, which indicates she was Cherokee. Her great-great

grandmother on the other side was full-blooded Choctaw and was born in Choctaw County, Mississippi, in 1856. I don't have the name of the grandmother, great-great-great grandmother whose brothers and sisters followed the Trail of Tears other than she would -- she was -- the name that comes down on that side is Tennison."

The juvenile court ordered CSD to provide notice under the Act. Thereafter, CSD sent notices of the dependency proceedings to each of the Cherokee and Choctaw tribes notified previously, and also to the Bureau of Indian Affairs (BIA). Each of the tribes responded, indicating that they could not establish Indian heritage.

At the April 28, 2003, contested section 366.26 hearing, CSD advised the juvenile court that all of the tribes had responded that the minor was not an Indian child. Counsel for appellant stated that he had information that suggested appellant's paternal great grandmother was "full-blooded Choctaw and an enrolled member." Counsel also stated he had provided all of the information he had acquired to CSD. The juvenile court then stated: "It appears to this Court all of the information has been provided to the tribes with that information. They've failed to recognize this child as an Indian child or that the child is eligible for membership nor either of the parents. I don't know what other information could possibly be given to them that could change that. The Court finds ICWA does not apply."

At the conclusion of the section 366.26 hearing, the juvenile court found the minor to be adoptable and terminated appellant's parental rights. Appellant appeals from that order.

DISCUSSION

Appellant contends the juvenile court and CSD failed to provide tribal notice in compliance with the requirements contained in the Act. According to appellant, all orders entered after the juvenile court learned the Act might be applicable, including the order terminating parental rights, are void. Moreover, appellant argues, the finding that the minor is not Indian must be reversed for a lack of substantial evidence.

In 1978, Congress passed the Act, which is designed "to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family services programs." (25 U.S.C. § 1902; *Mississippi Choctaw v. Holyfield* (1989) 490 U.S. 30 [104 L.Ed.2d 29].)

To effectuate the purposes of the Act, "'child custody proceeding[s]'" involving, among other proceedings, the "'foster care placement'" of, and "'termination of parental rights'" to, an Indian child, are subject to special federal procedures (25 U.S.C. § 1903(1)(i)-(iv).) "'[F]oster care placement'" means "any action removing an Indian child . . . for temporary

placement . . . ." (25 U.S.C. § 1903(1)(i).) "'Termination of parental rights'" means "any action resulting in the termination of the parent-child relationship." (25 U.S.C. § 1903(1)(ii).)

Among the procedural safeguards imposed by the Act is the provision of notice to various parties. Title 25 United States Code section 1912(a) provides as follows: "In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian *and the Indian child's tribe*, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. *If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who* shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary . . . ." (Italics added.)

The Act provides for invalidation of dependency proceedings, including a termination action, for violation of the notice provision in an action brought by the Indian child, parent, Indian custodian, or the Indian child's tribe. (25 U.S.C. § 1914.) The Act also contains various evidentiary and

other requirements, which may be different from state law and procedure. (25 U.S.C. §§ 1912(d), (f), 1915.)

A major purpose of the Act is to protect "Indian children who are members of or are eligible for membership in an Indian tribe[.]" (§ 1901(3).) For purposes of the Act, "'Indian child' means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe[.]" (§ 1903(4).)

In support of her claims, appellant relies in part in *In re Kahlen W.* (1991) 233 Cal.App.3d 1414. In that case, the court stated that "Notice is a key component of the congressional goal to protect and preserve Indian tribes and Indian families. Notice ensures the tribe will be afforded the opportunity to assert its rights under the Act irrespective of the position of the parents, Indian custodian or state agencies. Specifically, the tribe has the right to obtain jurisdiction over the proceedings by transfer to the tribal court or may intervene in the state court proceedings. Without notice, these important rights granted by the Act would become meaningless." (*Id.* at p. 1421.)

In *In re Kahlen W., supra,* 233 Cal.App.3d 1414, a social services employee spoke with three different Miwok tribes, attempting to determine the minor's status. In granting the writ sought by the mother of the minor, the appellate court held that the department had failed to notify the tribe of its right

to intervene in the proceedings, as required by the Act. (*Id.* at pp. 1418, 1420, 1424, 1426.)

The court rejected the department's contention that the record showed substantial compliance with the notice provisions of the Act. It noted that all pertinent authority plainly required "actual notice to the tribe of both the proceedings and of the right to intervene." (*In re Kahlen W., supra,* 233 Cal.App.3d at pp. 1421-1422, italics omitted.) Mere "'awareness'" of the proceedings is not sufficient under the Act. (*Id.* at p. 1422.)

In re Kahlen W., supra, 233 Cal.App.3d 1414 emphasized that notice is mandatory and that ordinarily failure in the juvenile court to secure compliance with the Act's notice provisions is prejudicial error. The only exceptions lie in situations where "the tribe has participated in the proceedings or expressly indicated [it has] no interest in the proceedings." (*Id.* at p. 1424; but see *In re Junious M.* (1983) 144 Cal.App.3d 786, 794, fn. 8.)

The *In re Kahlen W.* court rejected a suggestion by the department that its noncompliance with the notice provisions of the Act was a result of the mother's failure to cooperate by not providing the department with the roll number and by not timely communicating her ancestry. (*In re Kahlen W., supra,* 233 Cal.App.3d at p. 1424.) As the court pointed out, the Act is intended to protect the interests of the tribe as well as those of the minor's parents. (*Id.* at p. 1425.) Moreover, the minor

is entitled to the protection of the Act irrespective of the actions of the parents. (*Ibid.*) Finally, the court rejected the claim that by her silence, the mother waived her rights under the Act. (*Ibid.*)

California Rules of Court, rule 1439(f) [further references to rules are to the California Rules of Court], provides in part: "(3) Notice shall be sent to all tribes of which the child may be a member or eligible for membership. [¶] (4) If the identity or location of the parent or Indian custodian or the tribe cannot be determined, notice shall be sent to the specified office of the Secretary of the Interior, which has 15 days to provide notice as required. [¶] (5) Notice shall be sent whenever there is reason to believe the child may be an Indian child, and for every hearing thereafter unless and until it is determined that the child is not an Indian child."

Rule 1439(g)(1) provides in part: "Determination of tribal membership or eligibility for membership is made exclusively by the tribe. [¶] (1) A tribe's determination that the child is or is not a member of or eligible for membership in the tribe is conclusive."

In this case, CSD received information from appellant that suggested there was Cherokee and Choctaw Indian heritage in her family. Thereafter, according to CSD, it notified six tribal units; eventually, all responded. Correspondence contained in the record reflects determinations by all of those tribes that the minor was not "Indian" within the meaning of the Act.

The Federal Register lists those Indian tribal entities eligible to receive services under federal law. That list contains three Cherokee entities: Cherokee Nation, Oklahoma; Eastern Band of Cherokee Indians of North Carolina; and United Keetoowah Band of Cherokee Indians in Oklahoma. The list also contains the names of three Choctaw tribes: Choctaw Nation of Oklahoma, Jena Band of Choctaw Indians, Louisiana, and Mississippi Band of Choctaw Indians, Mississippi. (67 Fed. Reg. 46328 et seq. (July 12, 2002).)

Appellant contends CSD failed to establish it provided proper notices to BIA and the tribes. The record reflects the contrary. It contains copies of proofs of service of notices and return receipts, showing that CSD mailed the notices by certified or registered mail service. If appellant's complaint is directed at the form of service -- registered versus certified -- we regard either form as sufficient to show substantial compliance under the Act. (Cf. *In re Jonathan D.* (2001) 92 Cal.App.4th 105, 110.)

Appellant claims that the determination by the juvenile court that the Act did not apply to the proceedings lacks substantial evidence, because not all of the tribes notified had rendered a determination regarding the Indian status of the minor. As we have noted already, the record shows that by the time of the section 366.26 hearing, all of the tribes that were notified had responded to the second set of notices by CSD. Those responses indicated the minor was not a tribal member, nor

was she eligible for tribal membership. Accordingly, the minor was not an Indian child under the Act. Thus, substantial evidence support the juvenile court's finding.

Appellant asserts that the second set of notices to the tribes failed to provide them with the information "necessary for notice compliance with [the Act]. No findings and orders, or petition were provided to [the Bureau of Indian Affairs] or the tribes. No addresses or other known names of the parents and relatives, including maiden names, were provided."

Appellant has failed to sustain her burden of proving the notice deficiencies alleged in her brief. First we presume CSD attached all necessary documents, including a copy of the dependency petition, to the notices sent to the tribes. (Evid. Code, § 664.) Moreover, contrary to appellant's claim, the record reflects that the notices sent by CSD contain the names of numerous family members, including appellant's apparent maiden name. To the extent all names known to CSD and other identifying information are not contained in the proper boxes, we are persuaded nevertheless that the record shows substantial compliance with the Act's notice requirements. (See *In re Jonathan D.*, *supra*, 92 Cal.App.4th at p. 110.)

This court has held that "[n]either the Act nor the various rules, regulations, and case law interpreting it require [a child services department] or the juvenile court to cast about, attempting to learn the names of possible tribal units to which to send notices, or to make further inquiry with [the Bureau of

Indian Affairs]." (*In re Levi U.* (2000) 78 Cal.App.4th 191, 199.) In that case, however, we observed that when a party proffers the name of a tribe, there is a duty to notify that tribe. There, "the lack of any information suggesting anyone in the family had a specific tribal affiliation constituted a determination that neither appellant nor the minor was eligible to become a tribal member." (*Id.* at p. 198.) Here, on the other hand, such information *was* provided. Moreover, the record suggests that CSD acted properly on the information it received.

From an examination of the responses made by the tribes, we conclude that the notices sent by CSD contained sufficient information from which the tribes could make their determination as to the minor's eligibility for tribal membership. None sought additional information, nor did any state that incomplete information had been provided by CSD. Letters from Cherokee Nation, Eastern Band of Cherokee Indians of North Carolina, and United Keetoowah Band of Cherokee Indians in Oklahoma acknowledged the tribe's right to intervene in the dependency proceedings if it had wished to do so. Moreover, the letter from Jena Band of Choctaw Indians, Louisiana included the names of both appellant and the father of the minor. Finally, letters from the Mississippi Band of Choctaw Indians and the Cherokee Nation, Oklahoma contained the birth date of the minor and the names and birth dates of numerous family members.

On this record, we may presume official duty was performed (Evid. Code, § 664), and determine that in this case, CSD sent

the notices containing the information required by the Act to the tribes in the manner prescribed in the Act. We conclude that the proceedings complied with the notice provisions of the Act. There was no error.

DISPOSITION

The orders denying the petition for modification and terminating parental rights are affirmed.

HULL, J.

We concur:

SIMS, Acting P.J.

DAVIS, J.